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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO: 81-2355

UNITED STATES OF AMERICA

Petitioner,

v.

IONIAN GLOW MARINE, INC.

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

In a mutual fault collision between a Navy vessel and a private cargo vessel, where the Government files an affirmative claim against the private vessel owner for its entire apportionable damages and stipulates to its own negligence, is the private shipowner also entitled to apportionment of its entire damages suffered in the collision.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATUTE INVOLVED

Section 3 of the Public Vessels Act, 46 U.S.C. §783, provides:

> In the event of the United States filing a libel in rem or in personam in admiralty for damages caused by a privately owned vessel, the owner of such vessel, or his successors in interest, may file a cross libel in personam or claim a set-off or counterclaim against the United States in such suit for and on account of any damages arising out of the same subject matter or cause of action: Provided, That whenever a cross libel is filed for any cause of action for which the original libel is filed by authority of this Act [46 USCS §781 *et seq.*], the respondent in the

cross libel shall give security in the usual amount and form to respond to the claim set forth in said cross libel unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security shall be given.

STATEMENT

On March 4, 1979, while manned by reservists returning from the Mardi Gras festival in New Orleans, the USS FRANCIS MARION collided with the private cargo vessel STAR LIGHT. Both vessels sustained damages. Damages to the USS FRANCIS MARION included injury to three of her servicemen.

In the subsequent limitation of liability proceeding, the Government and the three injured servicemen filed claims for their damages arising out of the collision. (C. App. 18, 21, 27, 28). Ionian Glow Marine, Inc., as owner of the STAR LIGHT, asserted a counterclaim against the Government under the Public Vessels Act, 46 USC §781 *et seq.* (C. App. 23). The 46 U.S.C. §783 counterclaim sought Ionian Glow's own damages arising out of the same collision — including, but not limited to, any payments which the shipowner might ultimately make to the service claimants for their personal injury damages.

Following extensive pleadings, discovery and pre-trial preparation, Ionian Glow and the Government negotiated settlement of the liability aspect of the litigation.[1] Reflecting the substantial fault of both vessels, the settlement provided that the Government would pay 35% of Ionian Glow's provable damages, and that the shipowner would pay 65% of the Government's provable damages. (C. App. 30). As the Government concedes in its Petition for Certiorari, the settlement was made in accordance with the admiralty rule of apportioning damages arising out of proportionate fault collisions.

Upon entry of an interlocutory order apportioning fault, the shipowner proceeded with the defense of the service-

[1] At the Initial Pre-Trial Conference, the Eastern District of Virginia bifurcated the issues of liability and damages.

men's claims. The shipowner kept the Government fully apprised regarding the particulars of each claimant's injuries, damages, and settlement demands. The Government filed a petition in connection with each of these claims, asserting its liens for medical services provided these servicemen, under 42 U.S.C. §2651. The claims of the three crewmen aboard the USS FRANCIS MARION were ultimately settled by the shipowner for a total sum of approximately $700,000, out of which the Government was fully reimbursed for its lien for medical services. The Government and the shipowner reached an agreement as to the extent of the other damages, physical and consequential, suffered by the vessels, with the Government obtaining a net recovery well exceeding the personal injury damages.

The settlement agreement reserved for judicial determination the propriety *vel non* of including damage payments to the three naval crew members as part of Ionian Glow's apportionable damages. (C. App. 30). Agreeing on the absence of any genuine issue of material fact, the parties presented to the District Court, on cross motions for partial summary judgment, the question whether Ionian Glow's apportionable damages included personal injury payments to the three servicemen.

Relying on pleadings and supporting briefs, but without the benefit of oral argument, the District Court granted the Government's Motion for Partial Summary Judgment. (C. App. 61). Invoking *Feres v. United States*, 340 U.S. 135 (1950) and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), the lower court based its decision on characterization of the apportionment of damages between the Government and Ionian Glow as relating to third-party indemnity rather than traditional maritime allocation of collision damages.

Reversing, the United States Court of Appeals for the Fourth Circuit recognized that Ionian Glow's counterclaim seeking collision damages involved not an indemnity suit under the *Feres-Stencel Aero* doctrine, but rather traditional maritime apportionment of damages. The Fourth Circuit therefore noted that the case was governed by *The CHATTAHOOCHEE*, 173 U.S. 540 (1899), as reaffirmed by *Weyerhaeuser Steamship Co. v. U.S.*, 372 U.S. 597 (1963).

REASONS FOR DENYING THE PETITION

Rather than advancing any special or important reasons for granting the instant petition for certiorari, the Government largely confines itself to repeating precisely the same arguments on the merits previously addressed to the Fourth Circuit Court of Appeals. The Court of Appeals' decision not only is consistent with the precedent of both this Honorable Court and the lower courts, but also is supported by independent grounds not even reached by the Circuit Court.

I. THE COURT OF APPEALS' DECISION CREATES NO DOCTRINAL OR POLICY INCONSISTENCIES REQUIRING RESOLUTION BY THIS HONORABLE COURT.

The crux of the Government's petition lies in the alleged tension between the *Feres-Stencel* indemnity line of cases, on the one hand, and ancient admiralty jurisprudence apportioning the *entire* damages suffered by vessels involved in proportionate fault collisions, on the other. The fallacy in the Government's allegation of "tension" lies in its failure to distinguish between the two completely different doctrinal and policy concerns involved: (1) the concerns enunciated in *Feres-Stencel Aero,* relating to the need for uniform federal law, limitation on the Government's financial exposure, military morale and absence of unfairness from prohibiting indemnity by ordinance suppliers, in cases where a private contractor having a consensual relationship with the Government seeks indemnity, and (2) the ancient maritime concern with adducing care and vigilance, as well as fairness, to all parties involved in navigation, by apportioning *entire* damages stemming from a proportionate fault collision. The divergent focus of these distinct and separate concerns dispels any assertion that there exists a "tension" between the *Feres-Stencel Aero* line of indemnity cases, on the one hand, and *The CHATTAHOOCHEE* line of cases relating to admiralty's apportionment of damages in proportionate fault collision cases, on the other.

Hence, the Court of Appeals' decision is fully consistent with the decisions of this Honorable Court. The decision is equally consistent with case law from other circuits.

A. The Court of Appeals' Decision Comports With the Precedent of this Honorable Court Apportioning Entire Damages in Proportionate Fault Collisions.

Ship collisions, and the cause of actions arising therefrom, have long fallen exclusively within maritime jurisdiction. The principle of apportioning the *entire* damages suffered by vessels involved in mutual and/or proportionate fault collisions is the very heart of admiralty's comparative fault rule of allocating losses.[2]

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[2] The rule of apportioning damages in proportionate fault collisions extends at least back to this Honorable Court's seminal decision in *The Schooner CATHERINE v. Dickinson*, 58 U.S. 170 (1854). Distinguishing admiralty's apportionment of mutual fault collision losses from the common law principle of contributory negligence, the court recognized that the principle of apportioning damages was "the well-settled rule in English admiralty." *Id.* at 177. The court went on to postulate two policy considerations underlying the admiralty rule of apportioning damages in divided fault collisions: (1) the distributive justice achieved by making a party partially responsible for a collision liable for the entire loss; and (2) the prophylactic deterrent to future losses achieved by placing on a negligent party a portion of the entire damages caused by his fault. *Id.* at 177-78.

Following its decision in *The Schooner CATHARINE*, this Honorable Court has had occasion to amplify the admiralty principle of apportionment of damages resulting in proportionate fault collisions. For example, in *The ATLAS*, 93 U.S. 302 (1876), the Court recognized that the admiralty policy considerations underlying the rule of apportionment of damages required division of the vessel's *entire* damages. Tracing the rule in mutual fault collisions to Lord Stowell's analysis in *The Woodrop*, 2 Dodson 85, the court observed that where both parties were to blame "the loss must be apportioned between them, *as having been occasioned by both.*" *Id.* at 312 (emphasis added). In further exploring the rule for apportioning damages, the court stressed that the *entire damages* should be added together, as the basis of the apportionment.

> Under the second of the foregoing rules, — when both vessels are in fault, — *the sums representing damages are added together*, and the amount is equally divided between the parties: (and that rule prevails *in all cases where there is mutual fault* . . . Both vessels being in fault, the positive rule of the court of admiralty, says Lord Denman, requires the damage done to both ships be added together, and the combined amount to be equally divided between the owners of the two.)

Id. at 312-14. Thus, the Supreme Court earlier recognized that one of the inextricable incidents of the principle of apportioning damages in admiralty is that the *combined amount of the loss* must be apportioned between the offending vessels. *Id.* at 320.

Yet, the fact that the substantive maritime law may differ in many of its rules from the common law is, and has been, no reason to refuse to apply the proper maritime law to a particular case. In *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), in overturning its decision in *The HARRISBURG*, 119 U.S. 199 (1866) — which had held that the maritime law did not recognize an action for wrongful death — this Honorable Court recognized the distinct functional considerations underlying admiralty law as a field of jurisprudence. Concluding that *The HARRISBURG* had been wrong in relying on common law precedent, Justice Harlan stated for a unanimous Court:

> [I]t is not apparent why the Court in *The HARRISBURG* concluded that there should not be a different rule for admiralty from that applied at common law. Maritime law had always, in this country as in England, been a thing apart from the common law.

Similarly, in *The MAX MORRIS*, 137 U.S. 1 (1890), the Supreme Court again recognized that the rule of apportionment of damages requires "the damages suffered by the two vessels being added together." As *The MAX MORRIS* court observed, injuries to third parties were collectible and should be apportioned between both vessels:

> In the case of The WASHINGTON, two vessels were held in fault for a collision which resulted in injuries to an innocent passenger on one of them, who proceeded against both in the same libel. This court held that the damages to the passenger ought to be apportioned equally between the two vessels with the reservation of a right in the libellant to collect the entire amount from either of them in case of the inability of the other to respond for her portion.

Id. at 9. *See also The ALABAMA*, 92 U.S. 695, 697 (1875). Other cases have similarly indicated that admiralty's rule of apportioning damages in proportionate fault collision cases requires allocation of *all* damages stemming from the collision. *See Atlee v. Packet Company*, 88 U.S. 389 (1874); *The JUNIATA*, 93 U.S. 337 (1874).

Thus, in *The CHATTAHOOCHEE*, *supra*, the cargo interest successfully recovered its *full loss* from the non-carrying vessel on a mutual fault collision — where recovery of such loss from the carrying vessel was barred by the provisions of the Harter Act, 46 U.S.C. §190 *et seq.*, because the carrying vessel's sole negligence was one of navigation. The Supreme Court held that even though it was immune from liability to cargo by

398 U.S. at 386-87. This Honorable Court most recently reiterated the continued vitality of maritime law as a distinct corpus of jurisprudence — as well as the desirability of admiralty law's uniformity — in *Foremost Insurance Co. v. Richardson*, ____U.S. ____, 50 U.S.L.W. 4778 (June 23, 1982).

B. The Court of Appeals' Decision Comports With the Decisions of Other Circuits.

Similarly, the lower courts have had no difficulty in distinguishing the admiralty principles underlying *The CHATAHOOCHEE-Weyerhaeuser* line of cases apportioning damages in proportionate fault collisions from *Feres-Stencel Aero* indemnity. In *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir.) *cert. denied sub nom., United Air Lines v. United States*, 379 U.S. 951 (1964), the district court had relied on the exclusivity provision of the F.E.C.A., *supra*, and upon *Feres* to bar a suit by United Air Lines against the United States for indemnity in respect of wrongful death actions brought against the airline by both civilian and military government employees. The *Weiner* expressly distinguished *Weyerhaeuser:*

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statute, the carrying vessel nevertheless was obligated to bear its proportionate share of the loss under the divided damages rule.

Sixty years later, this Honorable Court again considered the propriety of a third-party claim as an element of total collision damages, where a statutory bar existed to the assertion of claims against one of two shipowners. In *Weyerhaeuser, supra*, the court again recognized the applicability of traditional maritime apportionment of collision damages to actions involving a public vessel. Specifically, the *Weyerhaeuser* court analyzed the Federal Employees' Compensation Act, 5 U.S.C §7902, *et seq.*, and found "no evidence . . . of any purpose to disturb settled doctrines of admiralty affecting the mutual rights and liabilities of private shipowners in collision cases." *Id.* at 601.

Overwhelming policy considerations underlie the principle that whenever the Government seeks affirmative relief, it waives its sovereign immunity. Failure to permit counterclaims or off-sets would prevent the very court, whose jurisdiction the Government had invoked, from according complete relief in the case. Moreover, absence of the waiver of sovereign immunity would work a gross injustice — on the one hand subjecting a private party to civil liability to the Government, while on the other hand depriving him of a chance to mitigate or off-set that liability by virtue of his own counterclaims.

> The Supreme Court in *Weyerhaeuser* . . . held that the express provisions of the statute do not qualify the historic admiralty rule of divided damages in mutual fault collisions. The admiralty rule of divided damages is to be distinguished from the rule of indemnity urged upon us by United since under admiralty law there arises from a collision involving mutual fault the *right to apportionment of all damages resulting therefrom*, including personal injuries, cargo damage, and damage to the ships. The divided damage rule is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured.

Id. at 402-03 (footnotes omitted, emphasis added). *Accord, Nutt v. Loomis Hydraulic Testing Co., Inc.* 552 F.2d 1126, 1132 (5th Cir. 1977); *Newport Air Park, Inc. v. United States*, 419 F.2d 342, 345 (1st Cir. 1969).

Nor are these cases weakened, as the Government would have this Honorable Court infer, by the decision in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975). As the Supreme Court has observed, *Reliable Transfer* effected no organic change in American maritime law, but merely a change in the method of apportionment of collision damages from equal division to on the basis of comparative fault. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271 n. 30.

In fact, not a single decision of any federal court, district or circuit, disagrees in the slightest with the Court of Appeals' decision below in the context of maritime collision law. Therefore, the writ sought by the government is wholly unjustified.

In short, maritime law has long acknowledged as sacrosanct, the all inclusive nature of collision damages suffered by each vessel in a collision, even when such damages include the claims of third parties asserted and allowable solely against one of the shipowners. *The CHATTAHOOCHEE, supra*. The right of each party to recover its proportionate share of its *total* provable damages emanates from the duties and obligations flowing between the shipowners *per se*, and *not* from either of the shipowner's relationship to third parties, or from any limitation thereon — statutory or judicial.

II. EVEN IF THE COURT OF APPEALS' DECISION CREATED INCONSISTENCIES, IT IS SUPPORTED BY INDEPENDENT GROUNDS NOT EVEN REACHED BY THE COURT.

In support of a judgment in his favor, a respondent may rely upon lines of analysis which were not passed upon, or which were even rejected, by the court below. *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Hankerson v. State of North Carolina*, 432 U.S. 233 (1977); *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). Where, as in the instant case, the error complained of by the petitioner would not affect the substantial rights of the parties because the same result would be reached on another ground, this Honorable Court should deny the Writ of Certiorari. *See The MONROSA v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959).

Yet, at least two independent grounds — not even reached by the Court of Appeals — support the decision below. First, the counterclaim provisions of the Public Vessels Act waived the Government's immunity. Second, the Government inherently waived its immunity in seeking affirmative relief.

A. The Counterclaim Provisions of the Public Vessels Act Waived the Government's Immunity.

The rule which the United States would impose can only be denominated a sub-species of sovereign immunity. The nature of one of the parties (i.e., sovereign) and of the personal injury claimants (military personnel) leads the Government to conclude that the United States is "immune," not from suit but rather from one specific damage element.

Yet, the instant case involves merely a simple application of the Public Vessel Act's counterclaim provision, 46 U.S.C. §783. *Section 783 expressly authorizes counterclaims whenever the United States sues in admiralty for damages caused by a privately owned vessel.*

In the instant case, the Government affirmatively invoked the aid and assistance of the judicial branch of government by filing a claim — even though it was not required to do so. By virtue of the counterclaim provisions of the Public Vessels Act, the Government thereby waived its immunity

with respect to Ionian Glow's counterclaim for damages arising out of the same collision. *Therefore, even if the Fourth Circuit's decision were otherwise in conflict with decisions of this Honorable Court or of other circuits, the instant case would involve a simple application of 46 U.S.C. §783 — an application not meriting review.*

B. Independently of the Public Vessels Act, In Invoking the Affirmative Aid and Assistance of the Courts, the Government Inherently Waived Any Immunity It Might Otherwise Enjoy.

Crucially, the principle underlying the admiralty rule of apportionment of damages lies in the recognition that — by the very nature of admiralty's apportionment of damage in mutual fault collision cases — the Government inherently waives its sovereign immunity with respect to damages to be apportioned. The courts have long recognized that, even where the sovereign enjoys immunity, it waives its immunity by pressing its affirmative claims for relief. The waiver rule applies to both foreign sovereigns and the United States.[3]

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[3] In reliance upon the long established admiralty jurisprudence of this Honorable Court, the lower courts have consistently held that whenever the Government comes into court seeking relief in admiralty collision cases, it waives its claim to sovereign immunity. For example, in *United Philippines Lines, Inc. v. Submarine USS DANIEL BOONE*, 475 F.2d 478 (4th Cir. 1973), the government had claimed sovereign immunity, while at the same time filing a counterclaim based on the collision in which it had been involved. Affirming the district court's finding that the Government had waived its immunity in suing for affirmative relief in admiralty, the appellate court observed:

> When the United States comes into an admiralty court and asks "the court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, we think the government is bound by the submission . . . " *United States v. The Steamer NUESTRA SENORA DE REGLA*, 108 U.S. 92, 103 (1883). By asking that justice be done with regard to a maritime collision, the United States becomes subject to the rule set forth in *Luckenback Steamship Co. v. The THEKLA*, 266 U.S. 328 (1924) . . . In seeking dismissal of the plaintiff's claim, an affirmative judgment on its counterclaim, and the arrest of the QUEZON in the instant case, the Government has so far taken the position of a private suitor as to waive its sovereign immunity. *This results from the peculiar "relationship characteristic of claims for collisions in admiralty but entirely absent in claims and cross-claims" in other civil cases.*

Id. at 479-480 (emphasis added).

This principle of waiver of sovereign immunity *derives from the unique nature of apportioning damages in admiralty collision cases.* In the *United States v. Shaw*, 309 U.S. 495 (1940), the Supreme Court recognized that the principle of *The THEKLA*, 266 U.S. 328 (1924), derived from the special nature of admiralty's apportionment of collision damages:

> *The THEKLA turns upon a relationship characteristic of claims for collisions in admiralty but entirely absent in claims and cross-claims in settlement of estates.* The subject matter of a suit for damages in collision is not the vessel libelled, but the collision. Libels and cross-libels for collisions are one litigation and give rise to one liability. In equal fault, the entire damage is divided. *As a consequence, when the United States libels the vessel of another for collision damages and a cross-libel is filed, it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision. That conclusion must be stated in terms of responsibility for damages.*

Id. at 502-03 (emphasis added).

In other words, by the very nature of apportionment of damages in maritime collisions, whenever the Government seeks to recover damages in proportionate or mutual fault collision cases, it inherently waives its immunity with respect to those damages. Otherwise, it would be impossible to apportion damages in accordance with the admiralty rule.[4] The *THEKLA*, *supra*, and its progeny rest on one primary underpinning: although a

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[4] The rule of *The THEKLA* has been repeatedly cited with approval, and no court has suggested that the Public Vessels Act vitiates the holding. *See e.g. United States v. Shaw*, 495 (1940); *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 134 (1928); *United Philippine Lines, Inc. v. Submarine USS DANIEL BOONE, supra; United States v. The AUSTRALIAN STAR*, 172 F.2d 472, 478 (2d Cir. 1949), *cert. denied*, 338 U.S. 823 (1949).

Thus, as Moore indicates, "the rule in admiralty . . . is clear that when a sovereign sues, an affirmative judgment may be rendered against the sovereign on a claim that grows out of the subject matter of the sovereign's suit." 3 *Moore's Federal Practice*, para. 13.27 (1981). *See also American Propeller & Mfg. Co. v. United States*, 300 U.S. 475, 478 (1937) (indicating continued viability of The THEKLA).

sovereign enjoys inherent immunity, whenever the sovereign, itself, affirmatively seeks relief from a court, it subjects itself to that court's jurisdiction — waiving its immunity — at least to the extent of the relief of which it seeks. This waiver would be equally applicable whether the Government sought immunity from its entire liability or simply from a sub species of its damages, as here.

III. ASSUMING THE COURT OF APPEALS' DECISION WERE OTHERWISE UNSUPPORTED BY EITHER PRECEDENT OR INDEPENDENT GROUNDS, PRUDENTIAL CONSIDERATIONS WOULD RENDER THE DECISION AN INAPPROPRIATE VEHICLE FOR REVIEWING THE *FERES-STENCEL AERO* DOCTRINE IN ADMIRALTY.

The instant proceeding, which construes a settlement contract based on a proportionate fault collision at sea, involves doctrinal and policy considerations totally different from the *Feres-Stencel Aero* line of cases. Unlike the *Feres-Stencel Aero* cases — where the Government was purely a defendant, and in no way benefited from the litigation, or otherwise took any affirmative action which might waive its immunity — the Government in the instant suit has not only affirmatively

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Conversely, adopting the premise which lies at the heart of the Government's case — that the *Feres-Stencel* line of cases somehow overruled 46 U.S.C. §783, as well as venerable American jurisprudence of the inherent waiver in seeking judicial assistance — would effect a radical transformation in the law of sovereign immunity. The sovereign's waiver of immunity upon seeking affirmative relief has been long recognized in the context of both domestic and foreign invocations of sovereign immunity. The principle has been codified by the Foreign Sovereign Immunities Act of 1976, *see* 28 U.S.C. §1607, as well as by U.S. statutes dating from 1797. *United States v. Shaw, supra*, 309 U.S. at 501. *See also* 28 U.S.C. §2406. In short, the principle that a sovereign who affirmatively seeks relief waives his sovereign immunity is endemic to traditional American notions of fair play and substantive justice. *See generally The DAVIS*, 77 U.S. (10 Wall.) 15, 21-11 (1869); *Guaranty Trust Company of New York v. United States*, 304 U.S. 126 (1928); *The SIREN*, 74 U.S. 152 (1868) (notwithstanding the sovereign immunity of the United States — whenever property itself, through affirmative action of the United States — becomes subject to the jurisdiction and control of the courts, a private suitor may enforce his claim for collision damages against that property.)

pressed claims against Ionian Glow, but also sought to have damages apportioned, and has ineluctably benefited from the apportionment of damages. Unlike the *Feres-Stencel Aero* line of cases — where the Government had at no time conceded its liability — the Government in the instant case has stipulated that it was 35% negligent, and that damages should be apportioned accordingly. Unlike the third-party indemnity involved in the *Feres-Stencel Aero* cases, the suit *sub judice* involves admiralty's proportionate fault *apportionment* of damages. Unlike the contractual relationships between the Government and the third-party plaintiffs in the *Feres-Stencel Aero* line of cases, the relationship between Ionian Glow and the Government in the instant case was not a consensual relationship, based on a commercial contract, but rather arose out of an involuntary collision at sea — a relationship which was obviously neither anticipated nor agreed to by either party. Unlike the *Feres-Stencel Aero* line of cases, the instant suit involves not novel theories of liability, but rather principles of allocating damages based on the ancient admiralty rule of proportioning damages in apportioned fault collisions — a rule at least one thousand years old. Unlike the *Feres-Stencel Aero* cases, the instant suit proceeds not under the Federal Tort Claims Act and indemnity principles, but rather stems from traditional principles of admiralty jurisprudence. In short, the facts *sub judice* are governed, not by the *Feres-Stencel Aero* indemnity jurisprudence, but rather by the unique admiralty principle of apportioning damages in proportionate fault collision cases.

The instant case does not involve a private ordinance supplier's suit against the government for indemnity or contribution. Rather, this case falls within the unique doctrines and policy considerations applicable to proportionate fault collision cases. As the Fifth Circuit has observed, the principle of apportionment of damages in proportionate fault collision cases represents a special principle of admiralty law:

> Questions of apportionment of damages in mutual fault collision cases occupy a unique and longstanding position in our law . . . Even with the comparative neg-

ligence rule, apportionment of damages in mutual fault collision cases still occupies a unique position in our law.

Nutt v. Loomis Hydraulic Testing Co., 552 F.2d 1126, 1132 (5th Cir. 1977).

Equally fallacious is the Government's suggestion that this Honorable Court's grant of certiorari in *Lockheed Aircraft Corp. v. United States*, No. 81-1181 (April 5, 1982) dictates a similar grant of certiorari in the instant case. As the Government admits in its own Brief in opposition in *Lockheed*, "even if correct, the decision [in *Ionian Glow Marine, Inc.*] has little bearing on this case [*Lockheed*], since the justification for departing from *Stencel* was *Weyerhaeuser's* unique divided damages rule, whose application, as noted above, is restricted to maritime collisions." As the Government, itself, recognizes the instant cases has nothing to do with the *Feres-Stencel Aero* line of cases — and does not merit review.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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